



## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Parts 5, 91, 92, 570, 574, 576, and 903

[Docket No. FR-6123-A-01]  
RIN 2529-AA97

#### **Affirmatively Furthering Fair Housing: Streamlining and Enhancements**

**AGENCY:** Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** This advance notice of proposed rulemaking (ANPR) invites public comment on amendments to HUD's affirmatively furthering fair housing (AFFH) regulations. The goal of the regulations is to provide HUD program participants with a specific planning approach to assist them in meeting their statutory obligation to affirmatively further the purposes and policies of the Fair Housing Act. HUD is committed to its mission of achieving fair housing opportunity for all, regardless of race, color, religion, national origin, sex, disability, or familial status. However, HUD's experience over the three years since the newly-specified approach was promulgated demonstrates that it is not fulfilling its purpose to be an efficient means for guiding meaningful action by program participants. Accordingly, HUD has determined that a new approach towards AFFH is required. As HUD begins the process of developing a proposed rule to amend the existing AFFH regulations, it is soliciting public comment on changes that will: minimize regulatory burden while more effectively aiding program participants to plan for fulfilling their obligation to affirmatively further the purposes and policies of the Fair Housing Act; create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of community characteristics; provide for greater local control and innovation; seek to encourage actions that increase housing choice, including through greater housing supply; and more efficiently utilize HUD resources. HUD is also reviewing comments submitted in response

to the withdrawal of the Local Government Assessment Tool and will consider those comments during HUD's consideration of potential changes to the AFFH regulations.

**DATES:** Comment Due Date: [**Insert date 60 days from date of publication in the Federal Register**]

**ADDRESSES:** Interested persons are invited to submit comments to the Office of the General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0001. Communications should refer to the above docket number and title and should contain the information specified in the "Request for Comments" section. There are two methods for submitting public comments.

*1. Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500. Due to security measures at all federal agencies, however, submission of comments by mail often results in delayed delivery. To ensure timely receipt of comments, HUD recommends that comments submitted by mail be submitted at least two weeks in advance of the public comment deadline.

*2. Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD and enables HUD to make comments immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> web site can be viewed by other commenters and interested members of the public. Commenters should follow instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the notice.

*No Facsimile Comments.* Facsimile (fax) comments are not acceptable.

*Public Inspection of Comments.* All comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Krista Mills, Deputy Assistant Secretary, Office of Policy, Legislative Initiatives, and Outreach, Office Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, SW, Room 5246, Washington, D.C. 20410; telephone number 202-402-6577. Individuals with hearing or speech impediments may access this number via TTY by calling the toll-free Federal Relay Service during working hours at 1-800-877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On July 16, 2015, HUD published in the Federal Register its Affirmatively Furthering Fair Housing (AFFH) final rule.<sup>1</sup> The principal AFFH regulations are codified in 24 CFR part 5, subpart A, with other AFFH related regulations codified in 24 CFR parts 91, 92, 570, 574, 576, and 903. The stated purpose of the AFFH final rule was to provide HUD program participants

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<sup>1</sup> 80 FR 42357.

with a revised planning approach to assist them in meeting their legal obligation to affirmatively further the purposes and policies of the Fair Housing Act. Since issuance of the final rule, however, HUD has concluded that the current regulations are ineffective in helping program participants to meet this obligation. The highly prescriptive regulations give participants inadequate autonomy in developing fair housing goals as suggested by principles of federalism. Additionally, the current regulations are ineffective in addressing the lack of adequate housing supply, which has particular adverse impact on protected classes under the Fair Housing Act. Finally, evidence from peer-reviewed literature indicates that the positive outcomes of policies focused on deconcentrating poverty are likely limited to certain age and demographic groups<sup>2</sup> and are difficult to implement at scale and without disrupting local decision making. HUD reached these determinations for the following reasons:

1. Ineffectiveness of assessment tools. Under the AFFH rule, HUD program participants are required to use an Assessment Tool to conduct and submit an Assessment of Fair Housing (AFH) to HUD. Because of the variations in the HUD program participants subject to the AFFH rule, HUD went through a process to develop three separate assessment tools: one for local governments, one for public housing agencies (PHAs), and one for States and Insular Areas.

There are currently no approved assessment tools that are available for program participants to use. The different assessment tools are unavailable for different reasons. A final State and Insular Area Assessment Tool has not yet been developed by HUD. In the case of the Assessment Tool for use by PHAs, HUD published a Federal Register notice on January 13, 2017<sup>3</sup>, announcing that the Assessment Tool was not yet available for use by PHAs because the

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<sup>2</sup> Chetty, Raj, Nathaniel Hendren, and Lawrence Katz. 2016. “The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Project.” *American Economic Review* 106 (4).

<sup>3</sup> 82 FR 4373.

HUD data needed to make the Assessment Tool workable was not yet available. HUD announced the availability of a Local Government Assessment Tool in a Federal Register notice published on December 31, 2015<sup>4</sup> and renewal of the Tool in a Federal Register notice published on January 13, 2017.<sup>5</sup>

Since publication of the January 13, 2017, notice, HUD became aware of significant deficiencies in the Local Government Assessment Tool impeding completion and acceptance of meaningful assessments by program participants. Accordingly, HUD withdrew the Local Government Assessment Tool in a Federal Register notice published on May 23, 2018<sup>6</sup>. As more fully explained in the May 23, 2018, withdrawal notice, HUD's decision was informed by its review of the initial round of AFH submissions that were developed using the Local Government Assessment Tool. This review led HUD to conclude that the Tool is unworkable based upon: (1) the high failure rate from the initial round of submissions; and (2) the level of technical assistance HUD provided to this initial round of 49 AFHs, which cannot be scaled up to accommodate the increase in the number of local government program participants with AFH submission deadlines in 2018 and 2019. Specifically, 63% of the initial 49 AFH submissions (31/49) were not accepted on initial submission. HUD returned 35% of these (17/49) as unacceptable. Many other AFH submissions (28% or 14/49) were accepted only after the program participants submitted revisions and additional information in the form of addendums in response to HUD's technical assistance. Interested readers are referred to the May 23, 2018, Federal Register notice for additional explanation regarding HUD's withdrawal of the Local Government Assessment Tool.

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<sup>4</sup> 80 FR 81840.

<sup>5</sup> 82 FR 4388.

<sup>6</sup> 83 FR 23922.

2. Public comments on HUD regulatory reform efforts. The request for comments contained in this ANPR is also consistent with HUD's efforts to carry out the Administration's regulatory reform efforts. On May 15, 2017, HUD published a Federal Register notice consistent with Executive Orders 13771, "Reducing Regulation and Controlling Regulatory Costs," and 13777, "Enforcing the Regulatory Reform Agenda," inviting public comments to assist HUD in identifying existing regulations that may be outdated, ineffective, or excessively burdensome.<sup>7</sup> HUD received 299 comments in response to the Notice, and 136 (45% of the total) discussed the AFFH rule.

While some of the comments expressed support for the AFFH rule, most of the comments were critical of the rule and cited its complexity and the costs associated with completing an AFH. The commenters wrote that the final rule fails to consider critical factors for program participants, such as the scarcity of available resources and other program priorities. Many of these commenters complained that the estimates contained in the final rule regarding the amount of time it would take to complete an AFH were unrealistically low. Small PHAs, in particular, wrote that compliance with the rule would result in their incurring large expenses. Other commenters complained that the rule is overly prescriptive. Still others noted deficiencies with the data program participants are required to rely on in completing their AFHs.

## **II. This Advance Notice of Proposed Rulemaking**

As HUD begins the process of developing a proposed rule to amend the existing AFFH regulations, it is soliciting public comment on changes that will: (1) minimize regulatory burden while more effectively aiding program participants to meet their legal obligations; (2) create a process that is focused primarily on accomplishing positive results, rather than on performing

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<sup>7</sup> 82 FR 22344.

analysis of community characteristics; (3) provide for greater local control and innovation; (4) seek to encourage actions that increase housing choice, including through greater housing supply; and (5) more efficiently utilize HUD resources.

While the following list is not exhaustive, HUD is particularly interested in comments on the following questions:

1. What type of community participation and consultation should program participants undertake in fulfilling their AFFH obligations? Do the issues under consideration in affirmatively furthering fair housing merit separate, or additional, public participation and consultation procedures than those already required of program participants in preparing their annual plans for housing and community development (i.e., the Consolidated Plan, Annual Action Plan, or PHA Plan)? Conversely, should public input on AFFH be included as part of the Consolidated Plan/PHA Plan public involvement process?

2. How should the rule weigh the costs and benefits of data collection and analysis? Should the proposed rule allow program participants to develop or use the data of their choice? Alternatively, should HUD require the use of a uniform data set by all program participants in complying with their AFFH obligation? Should it vary by the nature of the program participant? Instead of a data-centric approach, should jurisdictions be permitted to rely upon their own experiences? If the latter, how should HUD assess this more qualitative approach?

3. How should PHAs report their AFFH plans and progress? Should jurisdictions be required to provide a detailed report of the analysis performed or only summarize the goals? How often should program participants be required to report on their AFFH efforts? Should the proposed rule retain or revise the current timeframes for required AFFH submissions? Should program participants continue reporting annually on their AFFH actions and results in their

program plans and annual performance reports or, given the long-term nature of many AFFH goals, should the reporting period be longer? Should planning and/or results be integrated into existing report structures, such as Consolidated Plans and Consolidated Annual Performance and Evaluation Reports (CAPERs), or utilize an alternative structure?

4. Should the proposed rule specify the types of obstacles to fair housing that program participants must address as part of their AFFH efforts, or should program participants be able to determine the number and types of obstacles to address? Should HUD incentivize program participants to collaborate regionally to identify and address obstacles to affirmatively furthering fair housing, without holding localities accountable for areas outside of their control? Should HUD incentivize grantees and PHAs to collaborate in the jurisdiction and the region to remove fair housing obstacles? What are examples of obstacles that the AFFH regulations should seek to address? How might a jurisdiction accurately determine itself to be free of material obstacles?

5. How much deference should jurisdictions be provided in establishing objectives to address obstacles to identified fair housing goals, and associated metrics and milestones for measuring progress?

6. How should HUD evaluate the AFFH efforts of program participants? What types of elements should distinguish acceptable efforts from those that should be deemed unacceptable? What should be required of, or imposed upon, jurisdictions with unacceptable efforts (other than potential statutory loss of Community Development Block Grant, HOME, or similar funding sources)? How should HUD address PHAs whose efforts to AFFH are unacceptable?

7. Should the rule specify certain levels of effort on specific actions that will be deemed to be in compliance with the obligation to affirmatively further the purposes and policies of the Fair Housing Act (i.e., “safe harbors”), and if so, what should they be?



8. Are there any other revisions to the current AFFH regulations that could help further the policies of the Fair Housing Act, add clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist program participants in meeting their AFFH obligations?

### **III. Findings and Certifications**

#### **Environmental Impact**

This ANPR is exclusively concerned with nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), it is categorically excluded from environmental review under the National Environmental Policy Act (42 U.S.C. 4321-4347).

#### **Regulatory Review – Executive Orders 12866 and 13563**

Per Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of

Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This ANPR was reviewed by OMB and determined to likely result in a “significant regulatory action,” as defined in section 3(f) of Executive Order 12866.

Dated: August 9, 2018

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Anna Maria Farías  
Assistant Secretary for Fair Housing and Equal  
Opportunity

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